

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

In the Matter of	)	
	)	
Improving Competitive Broadband Access to	)	GN Docket No. 17-142
Multiple Tenant Environments	)	

**COMMENTS OF THE FIBER BROADBAND ASSOCIATION ON  
THE NOTICE OF INQUIRY**

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**INTRODUCTION AND SUMMARY**

The Fiber Broadband Association (“FBA” or “Association”)<sup>1</sup> hereby submits these comments in response to the Federal Communications Commission’s (“Commission’s”) Notice of Inquiry in the above-captioned proceeding seeking comment on “ways to facilitate greater consumer choice and enhance broadband deployment in multiple tenant environments (MTEs).”<sup>2</sup> Commercial and residential customers in MTEs represent a substantial portion of the communications market, and they are clamoring for access to fiber and other advanced, high-performance communications networks. Moreover, because MTEs contain large concentrations of customers, they frequently serve as focal points for community-wide fiber network

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<sup>1</sup> FBA was formerly known as the Fiber to the Home Council Americas (the “FTTH Council”). The Association’s mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The Association’s members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, FBA has more than 250 entities as members. A complete list of FBA members can be found on the organization’s website: <https://www.fiberbroadband.org/>.

<sup>2</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry, FCC 17-78 (rel. June 23, 2017) (“NOI”).

deployments. In order to meet this burgeoning demand, service provider members of FBA are seeking to deploy fiber networks to MTE customers as expeditiously as possible. In most instances, they are able to work cooperatively with MTE owners to obtain timely, just and reasonable access. However, far too often, they face significant impediments and either get delayed in entering MTEs or have their entry thwarted entirely, thereby frustrating the efforts of customers to obtain services from the providers of their choice. FBA thus appreciates the NOI to examine these concerns.

In these comments, FBA first discusses the benefits of fiber network deployments to MTEs. FBA then explains that: (1) because State and local governments have a great stake in ensuring MTE customers in their jurisdictions have access to advanced communications services, by virtue of their oversight of local real estate development, they have the proper authority in the first instance to ensure that MTE customers have reasonable access to communications providers of their choice; (2) marketing and bulk billing arrangements, when properly implemented, can accelerate the deployment of fiber and other advanced, high-performance communications networks, while giving MTE customers access to lower-priced services; and (3) providers must be able to control use of inside wiring they install and continue to own under the Commission's inside wiring framework, but, should they enter into a sale-exclusive leaseback arrangement with the MTE owner, they should bear the burden, if challenged, of demonstrating the arrangement is not anti-competitive or otherwise tantamount to an exclusive access arrangement prohibited under the Commission's rules.<sup>3</sup> FBA requests that the Commission use these and other comments in this proceeding to take the next step and propose regulations to implement FBA's

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<sup>3</sup> Similarly, the Commission should prohibit a provider from entering into an arrangement with an MTE owner that gives it exclusive rights to provide inside wiring.

proposals, which would facilitate the deployment of fiber and other advanced infrastructure to customers in MTEs.

**I. FACILITATING THE DEPLOYMENT OF BROADBAND TO MTEs IS AN IMPORTANT COMPONENT OF THE COMMISSION’S OVERALL AGENDA TO ACHIEVE NATIONAL BROADBAND CONNECTIVITY**

FBA commends the Commission for seeking to “explore ways in which [the Commission] can accelerate the deployment of next-generation networks and services and better enable innovation and competition in the market for high-speed access.”<sup>4</sup> In particular, FBA is encouraged that the Commission seeks to “eliminate or reduce barriers faced by broadband providers that seek to serve MTE occupants.”<sup>5</sup> Demand for higher-performance broadband services by consumers, businesses, and institutions is skyrocketing, especially in MTEs. The results of a 2016 survey of more than 2,000 residential MTE tenants and owners in the U.S. and Canada conducted for FBA (then, the FTTH Council) by market research firm RVA, LLC (“RVA”) demonstrates that MTE residents utilize broadband very heavily, indeed, to a greater extent than single-family home residents. On average, RVA found, MTE residents spend about 5.1 hours online per day compared to 4.8 hours per day for single family home residents.<sup>6</sup> Corroborating this, fiber-to-the-home (“FTTH”) broadband creates an 8 percent greater rental perception and a 2.8 percent greater sales value perception.<sup>7</sup> Additionally, fast and reliable broadband is now rated the single most important amenity for residential MTEs, above such

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<sup>4</sup> NOI, para. 1.

<sup>5</sup> *Id.*, para. 3.

<sup>6</sup> See Michael C. Render, “The Tangible Value Of Advanced Broadband To MDUs.” RVA, LLC, 8 (June 8, 2016) available at <http://glenechogroup.isebox.net/ftthconnect?default=tXExg6Xo> (“2016 MDU Survey”).

<sup>7</sup> *Id.* at 9, 14. Providing access to fiber was also shown to increase resident satisfaction and reduce churn among MDU renters.

options as an in-unit washer and dryer or a balcony. Survey respondents also indicated that having a choice of multiple broadband providers in the MTE is important.<sup>8</sup>

In response to increasing consumer demand, broadband service providers are accelerating their deployment of all-fiber (including FTTH) networks across the country.<sup>9</sup> In fact, because MTEs represent dense concentrations of potential customers, fiber build decisions frequently target passing MTEs. Broadband providers and consumers recognize that all-fiber networks provide the performance and scalability necessary to meet bandwidth demands far into the future. Accordingly, the Commission should, in considering how it can “facilitate greater consumer choice and enhance broadband deployment in [MTEs],”<sup>10</sup> adopt policies that will enable broadband network builders and service providers to work with MTE owners to provide high-performance broadband service to customers in MTEs on a reasonable basis as quickly as possible.

## **II. STATE AND LOCAL GOVERNMENTS POSSESS LONG-RECOGNIZED JURISDICTION TO MANDATE THAT MTE BUILDING OWNERS PROVIDE ACCESS TO TELECOMMUNICATIONS AND CABLE PROVIDERS ON A JUST AND REASONABLE AND NON-DISCRIMINATORY BASIS**

The NOI seeks comment on “whether there are state and local regulations that may inhibit or have the effect of inhibiting broadband deployment and competition within MTEs.”<sup>11</sup>

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<sup>8</sup> *Id.* at 9.

<sup>9</sup> See Sean Buckley, “U.S. FTTH deployment rose 13 percent in 2015, says FTTH Council,” FierceTelecom (Nov. 16, 2015) *available at* <http://www.fiercetelecom.com/telecom/u-s-ftth-deployment-rose-13-percent-2015-says-ftth-council> (citing FTTH Council/RVA, LLC research regarding the availability of FTTH services in the United States). In 2016, the growth rate for homes marketed with FTTH services rose even faster, at approximately 16 percent. See Michael Render, RVA LLC, “North American FTTH: The Latest Research” (presentation at 2016 Fiber Connect, Nov. 27, 2016).

<sup>10</sup> NOI, para. 2.

<sup>11</sup> *Id.*, para. 12.

This inquiry appears to focus primarily on “infrastructure access” requirements and mandates adopted at the State and local level. There is ample evidence to demonstrate that State and local mandatory access laws are adopted in response to local conditions, and are a well-established mechanism of promoting competition in cable and telecommunications services in MTEs. The Commission should continue to acknowledge the jurisdiction of State and local governments, by virtue of their oversight of local real estate development, to adopt mandatory access laws where State and local lawmakers perceive the need.

Four decades ago, States and local governments began to enact statutes enabling providers of cable service to obtain access to MTEs (or tenants in MTEs to obtain cable service from providers of their choice), when cable operators built out their networks to provide a new source of multi-channel video programming.<sup>12</sup> These statutes were intended to ensure that a property owner would not bar franchised cable providers from access to MTEs, including when a property owner had entered into an exclusive service arrangement with another provider.<sup>13</sup> The statutes allowed for video competition and consumer choice where MTE tenants would

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<sup>12</sup> See *Telecomms. Servs. Inside Wiring, et al.*, CS Docket No. 95-184 et al., First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1356, para. 35, n.82 (2003) (indicating dates of passage for State mandatory access laws) (“2003 Wiring Order”). While State and local mandated access statutes generally apply to providers of cable service, in limited instances, States and localities have adopted laws providing for access to MTEs by telecommunications service providers. Texas, for instance, adopted such a statute in 2000. See Chapter 26 of the Texas Utilities Code, Section 54. See also, Article 52 of the San Francisco Police Code, Ordinance No. 250-16: Occupant’s Right to Choose a Communications Service Provider.

<sup>13</sup> See *Telecomms. Servs. Inside Wiring, et al.*, CS Docket No. 95-184 et al., Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3744, para. 182 (1997) (“1997 Wiring Order”); see also *AMSAT Cable v. Cablevision Ltd. P’ship*, 6 F.3d 867, 869 (2d Cir. 1993) (affirming a district court ruling that held that the Connecticut mandatory access statute was constitutional after a franchised cable company threatened to use the law to gain access to a building party to an exclusive service agreement with a satellite service provider).

otherwise be forced to take video services from a service provider of the property owner's choosing. In essence, these laws served as "consumer protection laws at a time before franchised cable operators faced competition from alternative video service providers."<sup>14</sup>

Eighteen States, the District of Columbia, and numerous municipalities have passed mandatory access statutes, and cable operators have used the laws to extend their services to new customers.<sup>15</sup> Mandatory access laws are derived from State and local authority over property rights within their respective jurisdictions, including the rights of owners, and generally have the following elements:

- While some grant operators an unconditioned right to install facilities at an MTE property, most are triggered upon request for cable services from a provider of a tenant's choosing, allowing that cable provider to gain access if it is not already in the MTE.<sup>16</sup>
- They provide for "reasonable" or "just" compensation to the property owner in return for a provider's access to serve a requesting tenant<sup>17</sup> and establish reasonable restrictions on how a provider can access the property.<sup>18</sup>

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<sup>14</sup> See *1997 Wiring Order*, 13 FCC Rcd at 3744, para. 182.

<sup>15</sup> See Connecticut (Conn Gen. Stat. § 16-333a (2016)), Delaware (26 Del. C. § 613) (1983) (only if utility easements also exists)), District of Columbia (D.C. Code § 43-1844.1) (1981)), Florida (Fla. Stat. § 718.1232) (1982) (condos only)), Illinois (55 Ill. Comp. Stat. Ann. 5/5-1096) (1993)), Iowa (Iowa Code § 477/1) (1977)), Kansas (K.S.A. § 58-2553) (1983)), Maine (14 M.R.S.A. § 6041) (1987)), Massachusetts (Mass. Ann. Laws. Ch. 166A, § 22 (LexisNexis, 2017)), Minnesota (Minn. Stat. § 238.23) (1983)), Nevada (Nev. Rev. Stat. Ann. § 711.255) (1987)), New Jersey (N.J. Stat. § 48:5A-49) (1982)), New York (N.Y. Pub. Serv. Law § 228) (1995)), Ohio (ORC Ann 4931.04) (1998)); Pennsylvania (68 P.S. § 250.503-B) (1993)), Rhode Island (R. I. Gen. Laws, § 39-19-10) (1993)), Virginia (Va. Code Ann. § 55.248, 13:2) (1997)), West Virginia (W. Va. Code § 5-18A-1) (1995)), and Wisconsin (Wis. Stat. § 66.0421) (2001)).

<sup>16</sup> See, e.g., N.Y. Pub. Serv. Law § 228 (Consol., 2017).

<sup>17</sup> See, e.g., 55 Ill. Comp. Stat. Ann. 5/5-1096 (LexisNexis, 2016); Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017); R.I. Gen. Laws, § 39-19-10(6) (2016).

<sup>18</sup> For example, New York's mandatory access law states that a provider with access to the property will "conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the



- They provide an indemnity to the landlord for damages caused by installation and provision of service.<sup>19</sup>

Courts generally have upheld mandatory access laws,<sup>20</sup> except where the laws offered no compensation to the property owner.<sup>21</sup>

The Commission also has addressed mandatory access laws on two occasions, declining in each case to preempt or otherwise interfere with them.<sup>22</sup> First, in its *1997 Wiring Order*, the

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convenience and well-being of the occupants.” Article 52 § 5207. *See* N.Y. Pub. Serv. Law § 228 (1)(a)(1) (Consol., 2017) (requiring “the installation of cable television facilities [to] conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants”); *see also* Wis. Stat. § 66.0421(3) (2017) (requiring a “video service provider [to] install facilities to provide video service in a safe and orderly manner and in a manner designed to minimize adverse effects to the aesthetics of the multiunit dwelling or condominium”).

<sup>19</sup> *See, e.g.*, Conn. Gen. Stat. § 16-333a (2016); Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017); W. Va. Code § 5-18A-1 (1995); Nev. Rev. Stat. Ann. § 711.255 (1987).

<sup>20</sup> *See, e.g.*, *NYT Cable TV v. Homestead at Mansfield*, 543 A.2d 10 (1988) (N.J.) (*per curiam*) (upholding constitutionality of mandatory access provision of New Jersey statute and finding that, as a matter of legislative intent, the provision required the payment of just compensation); *Princeton Cablevision, Inc. v. Union Valley Corp.*, 478 A.2d 1234 (N.J. Super. Ct. 1983); *Direct Satellite Commc’ns, Inc. v. Bd. of Pub. Utils.*, 615 F. Supp 1558 (D.N.J. 1985) (based on the New Jersey statute, also rejecting First Amendment claims of apartment owner to restrict access); *Times Mirror Cable Television, Inc. v. First Nat’l Bank*, 582 N.E.2d 216 (Ill. App. Ct. 1991).

<sup>21</sup> *See, e.g.*, *Beattie v. Shelter Props., IV*, 457 So.2d 1110 (Fla. Dist. Ct. App. 1984) (affirming a lower court ruling that a Florida mandatory access law amounted to an unconstitutional taking because it offered no just compensation to the property owner).

<sup>22</sup> *See 1997 Wiring Order*, 13 FCC Rcd at 3748, para. 190; *see also 2003 Wiring Order*, 18 FCC Rcd at 1344, para. 2. Additionally, the Commission recently was asked by the Multifamily Broadband Council (“MBC”) to preempt a San Francisco ordinance requiring MTE owners to permit competing broadband providers to use existing wiring in the MTE upon request from an occupant. As FBA explained in its comments in response to MBC’s request, the Commission should not preempt the San Francisco ordinance because it promotes competition and consumer choice, and is grounded in the city’s well-established authority to regulate property owners and landlord-tenant relationships. *See*

Commission refused to preempt State mandatory access laws or establish a federal mandatory access law.<sup>23</sup> Rather, the Commission concluded that federal wiring rules would not preclude State mandatory access laws, and state courts would decide the “enforceability of a state mandatory access statute” under State law.<sup>24</sup> Accordingly, the Commission left it to States and localities to decide the need for, scope, and enforceability of mandatory access laws. Second, in its *2003 Wiring Order*, the Commission again refused to preempt State mandatory access laws, and encouraged States to reform and find innovative ways to promote competition in their own jurisdictions,<sup>25</sup> something FBA urges the Commission to continue today.

The Commission’s consistent statements and rulings declining to assert jurisdiction over property owners on issues of access leave ample room for States and localities in their jurisdictions to decide how best to strike the proper balance between a tenant’s consumer protection rights and a landlord’s property rights to encourage competition and consumer choice. Mandatory access laws, premised on the States’ and municipalities’ jurisdiction over property owners and the landlord-tenant relationship and in ensuring MTE tenants in their jurisdictions have access to advanced communications services, complement the Commission’s actions in the

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Comments of the Fiber Broadband Association, MB Docket No. 17-91 (filed May 18, 2017).

<sup>23</sup> *1997 Wiring Order*, 13 FCC Rcd at 3742-43, 3748, paras. 178, 189.

<sup>24</sup> *See 1997 Wiring Order*, 13 FCC Rcd at 3698, para. 79 (considering whether existing State mandatory access laws afforded a sufficient legally enforceable right for incumbent operators to maintain their home run wiring against the wishes of the property owner after application of the federal inside wiring rules); *see also* 47 C.F.R. § 76.804(a) (“Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a minimum of 90 days’ written notice that its access to the entire building will be terminated . . .”).

<sup>25</sup> *See 2003 Wiring Order*, 18 FCC Rcd at 1358, para. 39.

*1997 Wiring Order* and *2003 Wiring Order* to promote competition. Therefore, the Commission should not interfere with State and local mandatory access laws.<sup>26</sup>

### **III. TELECOMMUNICATIONS AND CABLE PROVIDERS SHOULD BE PERMITTED TO ENTER INTO EXCLUSIVE MARKETING AND BULK BILLING ARRANGEMENTS WITH MTE OWNERS THAT ARE NOT ANTICOMPETITIVE**

In the NOI, the Commission seeks comment on whether exclusive marketing and bulk billing arrangements between service providers and MTE owners “adversely affect competition in the MTE market.”<sup>27</sup> FBA members have found that such arrangements can accelerate the deployment of fiber and other advanced, high-performance communications networks, because they can be an effective means of offsetting the substantial expenditures that are required to be made upfront to build such infrastructure.<sup>28</sup> The benefits of these arrangements also may be passed on to MTE customers. Indeed, at least one provider reports that bulk billing arrangements have enabled homeowners in the provider’s service area to mass their buying

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<sup>26</sup> The Commission, of course, maintains its authority pursuant to Section 253 of the Communications Act, as amended, to preempt any State law or local ordinance that prohibits or has the effect of prohibiting the provision of a telecommunications service. It also maintains its authority to preempt where a State law or ordinance otherwise conflicts with federal law or regulations, including the Commission’s rules applying to inside wiring.

<sup>27</sup> NOI, para. 13.

<sup>28</sup> Construction of broadband networks often is not undertaken without some guarantee of demand, for instance, through an exclusive marketing or bulk-billing arrangement. Thus, any effort by the Commission to adopt rules constraining the ability of service providers to enter into these types of arrangements with MTE owners is likely to slow the deployment of broadband networks at a time when the Commission is seeking to encourage them.

power for voice, data, and video services and obtain rates that are on average more than 60 percent lower than retail rates for competitive services.<sup>29</sup>

Moreover, exclusive marketing and bulk billing arrangements can be implemented without inhibiting access by competitors to MTEs.<sup>30</sup> With respect to exclusive marketing arrangements, the proposal in the NOI to “require specific disclaimers or other disclosures by providers with an exclusive marketing agreement in an MTE to make clear that there is no exclusive service agreement” would be beneficial.<sup>31</sup> Additionally, the Commission should clarify that such arrangements may not prohibit the MTE owner from providing information about other service providers upon request of a tenant or responding to inquiries by tenants or would-be tenants as to other providers in the MTE. These measures will help mitigate the risk of such arrangements having anticompetitive effects.

In addition, Commission involvement with exclusive marketing and bulk billing arrangements is less imperative because such arrangements are subject to scrutiny under State laws that govern the rights of residents of homeowners’ and condominium associations and other MTEs to obtain services of their choice from providers of their choice. These State regulatory schemes provide protection to the association for service contracts entered into with developers before turnover of control of the association to the unit owners (“pre-association contracts”). What FBA explained to the Commission in 2007 remains the case: there are several varieties of these regulations, and the Commission should abstain from adopting new regulations that will

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<sup>29</sup> See Hotwire Communications, “Experts in Serving Multi-Family Communities,” available at <https://gethotwired.com/bulkservices> (last viewed July 20, 2017).

<sup>30</sup> But the Commission should be prepared to examine any individual exclusive marketing agreement where there is evidence that it is anticompetitive or otherwise violates the Communications Act.

<sup>31</sup> NOI, para. 13.

conflict with unknown State laws, an unknown number of association bylaws, and an unknown number of existing pre-association contracts.<sup>32</sup>

#### **IV. EXCLUSIVE WIRING ARRANGEMENTS RUN COUNTER TO THE PURPOSES OF FEDERAL LAW AND DO NOT WARRANT COMMISSION PROTECTION**

The NOI seeks comment on “on how exclusive wiring arrangements are affecting the level of broadband competition in MTEs” and specifically requests information on a type of arrangement flagged by INCOMPAS (so-called “leasebacks”) in which “MTE building owners purchase [unused] inside wiring [from the incumbent cable operator] and then lease back the idle wiring exclusively to the incumbent cable operator.”<sup>33</sup> FBA submits first that providers should be able to control use of inside wiring they install and continue to own under the Commission’s

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<sup>32</sup> See *Reply Comments of the Fiber-to-the-Home Council in the Further Notice of Proposed Rulemaking*, MB Docket No. 07-51 (filed Mar. 7, 2008). FBA further notes that the Commission’s authority to regulate marketing and bulk billing arrangements is limited. The Commission has jurisdiction over providers of telecommunications services (Section 201 *et seq.*) and multichannel video programming distributors (“MVPDs”) that are subject to Section 628 of the Communications Act for purposes of regulating marketing or bulk billing arrangements with MTE owners. However, the Commission does not have any authority to regulate entities that merely construct or deploy wireline networks and do not provide (transmit) communications services, and it only has limited jurisdiction over private MVPDs. The only sections of Title VI that apply to private entities are those that deal with such issues as cross-ownership with cable operators and equal employment opportunities. See 47 U.S.C. §§ 533(a), 554(h). The Commission cannot find any express authority to adopt such regulations in other parts of the Communications Act or other statutes. The only provision that has even a tenuous linkage to private MVPDs is Section 207 of the Telecommunications Act of 1996, which deals with Over-the-Air Reception Devices. This provision is particularly noteworthy because it provides express authority for the Commission to adopt rules to give tenants in MTEs access to DBS and other wireless reception devices for the purpose of receiving video programming from these over-the-air MVPDs. However, nowhere does it provide authority for the Commission to adopt rules permitting tenants to access wireline MVPDs or imposing requirements on private MVPDs in MTEs. If Congress intended for the Commission to extend its authority more directly over private MVPDs, it surely could have done so in light of these other targeted provisions it did include in the statutes.

<sup>33</sup> NOI, para. 15.

inside wiring framework. Such control is essential if a provider is going to receive a sufficient return on its investment to enter the MTE and deploy its facilities.

As for wiring arrangements whereby a service provider sells its wiring to the MTE owner and then obtains exclusive lease-rights, they should be presumed prohibited unless the provider and MTE owner can demonstrate they are not anti-competitive. Such exclusive wiring arrangements, as INCOMPAS notes, “leav[e] competitors with the choice of either installing duplicative wiring inside residential units or not serving the building at all.”<sup>34</sup> In effect, under these arrangements, legal ownership of the wiring infrastructure, which remains with property owner, is separated from control over the use of the wiring. If the incumbent provider assumes that control exclusively on a contractual basis, it would presumptively frustrate the purpose of the Commission’s inside wiring rules. By putting formal title to inside wiring in the hands of the property owner, while giving incumbents perpetual control or exclusive use rights (whether exercised or not), these arrangements amount to an end run around the Commission’s rules designed to facilitate competitive access to provider-owned wiring in the event of termination of the incumbent provider’s service.<sup>35</sup>

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<sup>34</sup> See Susan Crawford, *Dear Landlord: Don’t Rip Me Off When it Comes To Internet Access*, Backchannel (June 27, 2016), available at <https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.5pqcb96dq> (last visited May 15, 2017) (noting that Time Warner Cable “worked around” FCC rules “by deeding ownership to their inside wires to the building owner, and then getting an exclusive license back from the owner to use those wires”) (Crawford).

<sup>35</sup> NOI, para. 15. See also Carl Kandutsch Law Office, *Exclusive Use of Inside Wiring Clauses in Cable ROE Agreements* (May 2, 2014), available at <http://www.kandutsch.com/blog/exclusive-use-of-inside-wiring-clauses-in-cable-roe-agreements> (last visited May 15, 2017) (“[B]y specifying that the Internal Wiring belongs to the property owner, the agreement evades the FCC’s Inside Wiring Rules insofar as those rules apply only to inside wiring that is owned by the incumbent cable operator.”); see also 47 C.F.R. § 76.802.

While such arrangements may arguably clarify the rights between the property owner and service provider insofar as they grant exclusive rights to the property owner's infrastructure to a single preferred provider, they potentially undermine MTE tenant choice, and arguably can violate the Commission's inside wiring rules. If the incumbent provider transfers legal title to its home wiring to the property owner before a customer terminates service and then leases it back with an exclusivity provision that prevents competitive use, the inside wiring will be unavailable for use by competitors when the customer is ready to change providers. The Commission forbade this scenario through Section 76.802(j) of its cable home wiring rules, which places on the provider a duty to "take reasonable steps within [its] control to ensure that an alternative service provider has access to the home wiring at the demarcation point" and to not "prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service."<sup>36</sup> An exclusive leaseback agreement designed to prevent competitive use of wiring when the customer is ready to change providers potentially contravenes those obligations, and therefore the Commission should permit them, if challenged, only where the provider can demonstrate that they are not anti-competitive.

## **CONCLUSION**

For all of the above-stated reasons, FBA respectfully submits that the Commission should (1) not interfere with State and local mandatory access laws that promote competition in broadband deployment in MTEs; (2) continue to allow broadband providers to enter into marketing and bulk-billing arrangements with MTE owners that are beneficial to MTE tenants, subject to the conditions discussed herein; and (3) prohibit exclusive leaseback arrangements

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<sup>36</sup> 47 C.F.R. § 76.802(j).

within MTEs except where providers can show they are not anti-competitive. To effect these changes, the Commission should proceed to a rulemaking expeditiously.

Respectfully Submitted,

FIBER BROADBAND ASSOCIATION

A handwritten signature in cursive script, appearing to read "Heather Burnett Gold", is written over a horizontal line.

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